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No. 94-1966

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

DWIGHT J. LOVING,
Petitioner
v.
UNITED STATES OF AMERICA,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

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BRIEF OF UNITED STATES AIR FORCE LEGAL SERVICES AGENCY, APPELLATE DEFENSE DIVISION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*

The United States Air Force Legal Services Agency relies upon its Appellate Defense Division to represent Air Force personnel pursuant to 10 U.S.C. § 870 during appeals of their court-martial convictions and sentences. This division currently represents Senior Airman Jose Simoy, who, like Petitioner Dwight J. Loving, is under a sentence to death and is incarcerated at the United States Disciplinary Barracks, Fort Leavenworth, Kansas due to the findings and sentence of a general court-martial. Not only was our current client, Senior Airman Simoy, tried under the same court-martial procedures which tried and sentenced Petitioner, but all Air Force

personnel whose cases may be tried as a capital case are potentially at risk of a death sentence imposed by the same suspect procedures which are addressed as Issues I-IV in Petitioner's brief. Unless a writ of *certiorari* is issued and Petitioner's relief is granted, not only are significant rights of Air Force personnel at issue, but their very lives are at stake. The Appellate Defense Division is vitally interested in providing this Court with our perspective and insight on this area of the law and join Petitioner in support of this Court granting a writ of *certiorari*.

SUMMARY OF ARGUMENT

The establishment of aggravating factors and procedures to be used in military capital cases is a legislative decision vested exclusively in Congress which may not be delegated.

ARGUMENT

PURSUANT TO THE EIGHTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND THE DOCTRINE OF SEPARATION OF POWERS, THE ESTABLISHMENT OF AGGRAVATING FACTORS TO BE USED IN CAPITAL CASES IN THE ARMED FORCES TO NARROW THE CATEGORY OF PERSONS ELIGIBLE FOR THE DEALTH PENALTY IS A LEGISLATIVE DECISION VESTED EXCLUSIVELY IN THE CONGRESS WHICH CANNOT BE DELEGATED TO THE PRESIDENT.

Military laws, in many respects, differ from federal criminal laws and state criminal laws. Nevertheless, even military appellate courts have not hesitated to ensure that those who defend our nation's interests must not be deprived of Constitutional protections in courts-martial without strict analysis of and convincing evidence of military necessity.[1] In Petitioner's case, the absence of legislatively produced and sanctioned capital sentencing procedures unconstitutionally deprived Petitioner (and others) of the system of checks and balances in place to ensure that the Constitutional protections guaranteed to United States citizens are fully realized.

[1] *Courtney v. Williams*, 1 M.J. 267, 270 (C.M.A. 1976) indicates that "the burden of showing that military conditions require a different rule than that prevailing in the civilian community is upon the party arguing for a different rule." *Citing Kauffman v. Secretary of the Air Force*, 135 U.S. App. D.C. 1, 415 F.2d 991 (1969).

Further, no good and cogent reason has been advanced by appellate courts to justify any type or aspect of "military necessity" mandating less stringent safeguards in capital sentencing for military members. In fact, our military has been "all-volunteer" for decades and no evidence demonstrates the need for less stringent capital sentencing procedures in order to preserve our national defense or to preserve good order and discipline in the ranks. Arguments for a separate standard for military capital punishment processes are neither persuasive nor justified.

Capital cases particularly are subject to exacting scrutiny and procedural review in recognition of the finality and harshness of the sentence. *See generally, Woodson v. North Carolina*, 428 U.S. 280 (1976) and *Johnson v. Mississippi*, 486 U.S. 578 (1988). This Court has frequently and strongly indicated its demand that capital sentencing procedures be the product of the legislative branch with the responsibility over the crime and the person. *See generally, Whalen v. United States*, 445 U.S. 684 (1980) and *Gregg v. Georgia*, 428 U.S. 153 (1976). Despite this, the Court has never squarely faced the issue of the constitutionality of military capital sentencing procedures.

Admittedly, in administering military criminal justice matters, the President has historically been granted broad control over the military as commander-in-chief.[2] How-

[2] 10 U.S.C. § 836 grants the President only general powers to prescribe pretrial, trial, and posttrial procedures.

ever, it is now time to address the improper and overbroad delegation of legislative power which has occurred not only in Petitioner's case, but in other military capital cases as well, in light of the special concerns which capital litigation raises, *post-Furman v. Georgia*, 408 U.S. 238 (1972). The military's capital scheme unconstitutionally violates the separation of powers doctrine, so essential to our federal government's effective administration of constitutional laws and its key role in dispensing justice. Allowing the President some large grant of power in recognition of his Constitutional role as Commander-in-Chief could and should be consistent with this Court's determination that, since "death is different", the military's capital punishment scheme must be one area which requires legislative rather than executive action.

CONCLUSION

For the foregoing reasons, this Honorable Court should issue a writ of *certiorari* to the United States Court of Appeals for the Armed Forces, granting review of Petitioner's case. Issuance of the writ would ensure review of the constitutionally flawed, unacceptable court-martial processes which are employed in its capital cases.

Respectfully submitted,

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